LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U
F I L E D
MAY 28 1970
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, [redacted] 1970

No. [redacted] 195

HARRY DAVIS, d/b/a DAVIS MFG. CO., *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

EDWARD BENNETT WILLIAMS
HAROLD UNGAR
FRANK X. GROSSI, JR.
1000 Hill Building
Washington, D. C. 20006
Counsel for Petitioner

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

INDEX

	Page
Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit	1
Opinion Below	1
Jurisdiction	1
Questions Presented	2
Constitutional Provisions Involved	2
Statement of the Case	3
Reasons for Granting the Writ	7
Conclusion	12

CITATIONS

CASES:

Agoranos v. *United States*, 409 F.2d 883 (5th Cir. 1969), *cert. denied*, 396 U.S. 824 (1969)	11
Alderman v. *United States*, 394 U.S. 165 (1969)	9
Cohen v. *United States*, 405 F.2d 34 (8th Cir. 1968), *cert. denied*, 394 U.S. 943 (1969)	11
Feichtmeir v. *United States*, 389 F.2d 498 (9th Cir. 1968)	11
Goodman v. *United States*, 285 F. Supp. 245 (C.D. Calif. 1968)	7
Gouled v. *United States*, 255 U.S. 298 (1921)	8
Hensley v. *United States*, 406 F.2d 481 (10th Cir. 1968)	11
McCray v. *Illinois*, 386 U.S. 300 (1967)	10
Miranda v. *Arizona*, 384 U.S. 436 (1966)	5, 10, 11, 12
Roviaro v. *United States*, 353 U.S. 53 (1957)	7, 9, 10
Spinney v. *United States*, 385 F.2d 908 (1st Cir. 1967), *cert. denied*, 390 U.S. 921 (1968)	11
United States v. *Dickerson*, 413 F.2d 1111 (7th Cir. 1969)	10, 11
United States v. *Guerrina*, 112 F. Supp. 126 (E.D. Pa. 1953)	7, 9
United States v. *Habig*, 413 F.2d 1108 (7th Cir. 1969)	10
United States v. *Kordel*, 38 U.S.L.W. 4153 (February 24, 1970)	8

Page

United States v. *Lipshitz*, 132 F. Supp. 519 (E.D.N.Y. 1955) 7, 9
United States v. *Mackiewicz*, 401 F.2d 219 (2d Cir. 1968), *cert. denied*, 393 U.S. 923 (1968) 11
United States v. *Maius*, 378 F.2d 716 (6th Cir. 1967), *cert. denied*, 389 U.S. 905 (1967) 11, 12
United States v. *Mancuso*, 378 F.2d 612 (4th Cir. 1967), modified, 387 F.2 376 (4th Cir. 1967), *cert. denied*, 390 U.S. 955 (1968) 11
United States v. *Prudden*, 305 F. Supp. 110 (M.D. Fla. 1969) 7
United States v. *Wheeler*, 149 F. Supp. 445 (W.D. Penn. 1957), *rev'd on other grounds*, 256 F.2d 745 (3rd Cir. 1958), *cert. denied*, 358 U.S. 873 (1958) .. 7

RULES AND STATUTES:

18 U.S.C. § 3231 3
Internal Revenue Code § 7201, 26 U.S.C. § 7201 3
Internal Revenue Code § 7206(1), 26 U.S.C. § 7206(1) .. 3
28 U.S.C. § 1254(1) 1

UNITED STATES CONSTITUTION:

Fourth Amendment 2, 8
Fifth Amendment 2, 8

MISCELLANEOUS:

Internal Revenue Service News Release, No. 897 (October 3, 1967) 11

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No.

HARRY DAVIS, d/b/a DAVIS MFG. CO., *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, Harry Davis, requests that a writ of certiorari issue to review the decision and judgment of the Fifth Circuit Court of Appeals, affirming his conviction in the United States District Court for the Northern District of Texas for wilfully attempting to evade the federal income tax and for filing false and fraudulent income tax returns.

OPINION BELOW

The opinion of the Court of Appeals, printed in the appendix to this petition, is not yet officially reported.

JURISDICTION

The judgment of the Court of Appeals was entered on March 10, 1970, and petition for rehearing was denied, with opinion, on April 29, 1970. Jurisdiction is conferred on this Court by 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

In a tax evasion prosecution based on evidence supplied by the taxpayer to an Internal Revenue Agent who conducted an apparently routine civil tax audit without disclosing to the taxpayer that one of his purposes was to attempt to confirm an informer's "tip" of tax fraud,

(1) Whether the taxpayer was entitled to disclosure of the contents of the "tip" in support of his defense at trial that he had deceptively been deprived of his Fourth and Fifth Amendment rights; and

(2) Whether the taxpayer was constitutionally entitled to have been warned by the revenue agent, prior to his disclosure of incriminatory evidence, that he had a right to remain silent and to assistance of counsel.

CONSTITUTIONAL PROVISIONS INVOLVED

Fourth Amendment

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Fifth Amendment

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand July, except in cases arising in the land or naval forces or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against him-

self, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

In 1961 through 1963, petitioner was the sole proprietor of a textile business in Dallas, Texas, employing about six hundred persons. (R. 271, 780, 802.)

On January 9, 1969, he was convicted of evading income taxes in each of the three years, on proof that he had failed to report as income portions of his business receipts which he had diverted into a purely personal bank account. (R. 88.)[1]

On January 8, 1964, the Dallas Intelligence Division of I.R.S. received a report from an informant relating to petitioner's taxes for the prior three or four years. (R. 196.) The very next day the Audit Division requisitioned petitioner's 1962 return for examination. (R. 196-197.) This, according to an I.R.S. witness, was only a coincidence. (R. 196-197.)[2] However that may be, about two weeks later the Intelligence Division formally referred the matter to the Audit Division, transmitting to that division a memorandum of the in-

---

[1] Taxpayer was convicted of three counts of tax evasion (Section 7201 of the 1954 Internal Revenue Code, 26 U.S.C. § 7201) and three counts of filing a false return (Section 7206(1) of the 1954 Internal Revenue Code, 26 U.S.C. § 7206(1)) and was sentenced to five concurrent three-year prison terms, and to two years probation consecutive to the prison terms, and fined $25,000.00. (R. 92-93, 955-956.) Jurisdiction of the District Court in this case was under 18 U.S.C. § 3231.

[2] The existence and certain general characteristics of the report are established in the record but, as explained *infra*, the actual report was never disclosed to taxpayer's counsel. Thus, the record does not indicate whether Intelligence received the report from another field branch of the Service, such as Audit, or from the informant directly.

formation supplied by the informant. (Ex. 4; R. 49.)[3] In the Audit Division, the case, along with the informant's report, was assigned to Revenue Agent William Palmer, who decided to conduct an audit. (R. 165-166, 187-188, 209.) Sometime in May 1964, he telephoned petitioner and told him he was going to audit his books. (R. 114-115, 168.) Palmer then spent twenty working days (160 hours) at petitioner's plant during the months of June and July. (R. 179-180, 370.)

At no time during the investigation did Agent Palmer advise petitioner or his employees that there was an informant's report or that the investigation was other than a routine civil audit. (R. 115, 131, 169, 176.) As to the significance of the informant's report to his investigation, Palmer testified (R. 169-170):

> Q. . . . and at that time [during the investigation], in view of the informant's report, wasn't there suspicion in your mind that there was maybe something wrong?
>
> A. There could have been something wrong, but that wasn't proof to me; that was purely an unsubstantiated allegation.

(R. 176):

> Q. Did you tell him [taxpayer] at that time that you suspected him of committing some sort of Internal Revenue violation?
>
> A. No, I had no reason to believe that; that was an unsupported allegation; sir.

---

[3] "Ex.", unless otherwise indicated, refers to one of the designated exhibits in the appendix to the government's motion to quash a subpoena, which exhibits are reproduced in the record appendix in the Court of Appeals. (R. 41-62.) These exhibits were introduced in evidence as a unit by the defendant in the pre-trial motion to suppress hearing. (Def. Ex. 4; R. 134-135.)

The informant's report cannot, however, so easily be brushed aside. In his memorandum referring the case back to the Intelligence Division for criminal processing, Palmer clearly revealed that a purpose of his investigation was "confirmation of informant's allegations . . . ." (Ex. 6; R. 51-52.)

Agent Palmer testified that, when it appeared to him that there was evidence of crime, he told petitioner: "[Y]ou need to talk to your attorney about this." (R. 171.) That is the sum and substance of the warning given petitioner that he had been dealing with a "wolf in sheep's clothing." Even that warning, according to Palmer, was not given until the last day of his "civil" investigation (R. 171-172) and, thus, too late to serve any protective purpose.

The initial discovery of the diverting of receipts, moreover, appears to have been made midway through the audit, rather than at the end. Palmer thought he remembered learning of the telltale deposits in petitioner's private account at the end of his investigation. (R. 171-172.) Petitioner's general manager, however, testified that the audit went on for another month after Palmer had interrogated petitioner about the private account deposits. (R. 120-121.) The circumstantial evidence would seem to bear out the latter version of the facts, for if Palmer did not spend the major part of the total twenty working days of the audit on the matter of the diverted receipts, there would be no way of accounting for his time. He himself admitted that, but for that matter, the only items requiring investigation were travel and entertainment expenses, which "wouldn't take very long [to review]", and an "inventory item . . . that looked like it was a little out of line." (R. 185-187.)

Before trial, taxpayer moved to compel production of the informant's report as a part of a broader discovery motion (R. 16-21), and moved to suppress all admissions and records of taxpayer elicited during Palmer's investigation (R. 13-15). The District Court overruled the taxpayer's motions (R. 214-221) and the Court of Appeals affirmed, stating in relevant part (R. 959):

> We conclude that the trial court did not err . . . in denying appellant's motion to produce a statement by an unnamed informer who testified before the grand jury, but who did not testify at the trial.
>
> As to the contention that the trial court erred in denying appellant's motion to suppress evidence on the ground that the evidence had been obtained by "use of a revenue agent in lieu of a special agent to uncover incriminating evidence," without giving a *Miranda* warning and was a violation of taxpayer's Fourth, Fifth and Sixth Amendment rights is unsupported by the record. The trial court made full findings with respect to the normaley of the original investigation by the revenue agent to the effect that when he notified the appellant that he had better get a lawyer and that he (the agent), was turning the matter over to a "special agent".[4] This fact distinguishes the case from the others in this and other circuits in which the courts have begun applying, to some extent, some of the protections now afforded accused persons in other types of criminal actions.

---

[4] The statement that Agent Palmer notified petitioner "that he (the agent) was turning the matter over to a 'special agent' " is not warranted by the record. The District Court, in commenting on the evidence presented in the motion to suppress, mistakenly found that Agent Palmer issued such a warning. (R. 208.) The Court of Appeals perpetuated this error.

And on rehearing, the Court of Appeals modified its opinion by striking the first paragraph quoted above and further held (R. 961):

> The government did not use as a witness any employee of the appellant who had testified before the grand jury. The question of the correctness of the trial court's refusal to require the disclosure of the identity of the informer is therefore tested by the rule stated in *Roviaro* v. *United States*, 353 U.S. 53, which holds that protecting the identity of informers is an important policy which will yield only to a particularized showing of need in an individual case. We think that the trial court did not err in its decision to protect the identity of the informer in this case.

REASONS FOR GRANTING THE WRIT

1. Several district courts have squarely ruled that conducting a criminal tax investigation behind the facade of a civil audit violates the Constitution and warrants exclusion of evidence directly or indirectly obtained. *United States* v. *Prudden*, 305 F. Supp. 110 (M.D. Fla. 1969); *Goodman* v. *United States*, 285 F. Supp. 245 (C.D. Calif. 1968); *United States* v. *Wheeler*, 149 F. Supp. 445 (W.D. Penn. 1957) rev'd on other grounds, 256 F.2d 745 (3rd Cir. 1958) *cert. denied* 358 U.S. 873 (1958); *United States* v. *Lipsitz*, 132 F. Supp. 519 (E.D.N.Y. 1955); *United States* v. *Guerrina*, 112 F. Supp. 126 (E.D. Pa. 1953). The basis of the ruling was thus stated in the *Guerrina* case, 112 F. Supp., at 129:

> I can see no difference between a search conducted after entrance has been gained by stealth or in the guise of a business call, and a search for criminal purposes conducted under the guise of an

examination for purely civil purposes. Whether the arrangement to have Agent Coram [the Revenue Agent] make the appointment with the defendant was by design to obtain entrance for Special Agent Pearson [whose status was not disclosed], or whether it was done innocently, the effect in so far as the defendant was concerned was the same. He was deluded into giving consent to the examination of his papers and records and his action in so doing cannot be said to be voluntary in so far as making available his papers for purpose of investigation to establish fraud for criminal prosecution purposes.

Since the papers and information were obtained in violation of the Fourth Amendment, it follows that their use at time of trial would be a violation of the defendant's rights under the Fifth Amendment. *Gouled* v. *United States* [255 U.S. 298. (1921)]

The Solicitor General has recently acknowledged to this Court:

Even without a showing of bad faith, the courts have found unfairness where a government agency, after initiating an administrative or civil action against the defendant, did not inform him of the fact that criminal prosecution against him for the same conduct was seriously contemplated or had been recommended. Such failure to apprise the defendant of the contemplated criminal proceeding has been held to preclude the government's use therein of any evidence obtained in the civil proceeding.

United States v. *Kordel*, 38 U.S.L.W. 4153 (February 24, 1970), Brief for the United States, p. 32. In sustaining the conduct of the government in *Kordel*, this

Court, citing the *Guerrina* case and *United States* v. *Lipshitz, supra,* noted:

> We do not deal here with a case where the government has brought a civil action solely to obtain evidence for its criminal prosecution *or has failed to advise the defendant in its civil proceeding that it contemplates his criminal prosecution* . . .

38 U.S.L.W. at 4155-4156 (emphasis supplied).

In the instant case, on the issue whether the investigation of petitioner's affairs was a criminal investigation, springing from and designed to confirm the allegations of the informant's report, the contents of that report were obviously not only relevant but crucial. The defense was clearly entitled to disclosure of the report and a hearing to determine its relationship to the investigation. *See Alderman* v. *United States,* 394 U.S. 165, 180-85 (1969).

The policy established in *Roviaro* v. *United States,* 353 U.S. 53 (1957), confirms petitioner's right, for as the Court there said (353 U.S., at 60-61):

> Where the disclosure of an informer's identity, or of the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege [to conceal such information] must give way.

The informant's privilege, moreover, is designed to protect the identity of the government's informer, not the contents of the information. Here the government claims the informant's privilege for the contents of the report on a contention that to reveal the contents

would be to identify the informer. We submit that such extension of the privilege is unwarranted where, as here, nothing in the record shows either that this informant is a repeating source or that disclosure of his identity would in any way endanger him. *Compare McCray* v. *Illinois*, 386 U.S. 300 (1967). In the *Roviaro* balancing process, the demonstrated defense need for disclosure of the contents of the report must outweigh the conjectural governmental interest in hiding the informer's identity.[5]

2. In *United States* v. *Dickerson*, 413 F.2d 1111, 1117 (7th Cir. 1969), the Seventh Circuit held that "at the inception of the first contact with the taxpayer after the case had been transferred to the Intelligence Division," government tax investigators must apprise taxpayer of the right to remain silent and the right to counsel, as set forth in *Miranda* v. *Arizona*, 384 U.S. 436 (1966). In a companion case, *United States* v. *Habig*, 413 F.2d 1108, at 1110, n.4 (7th Cir. 1969), the court indicated that special circumstances may require warnings to be given earlier than formal transfer to Intelligence, which event the *Dickerson* court seemed to equate with the usual accusatory stage in a tax investigation. If the informant's report here confirms that the audit was really a criminal inquisition, petitioner, under *Dickerson*, should have received *Miranda*-type warnings at the outset. A contrary rule prevails,

---

[5] The fact that the informant did not testify for the government at trial, as the Court of Appeals found (R. 961), is immaterial. Moreover, it appears that this conclusion of the Court of Appeals was drawn from petitioner's *speculation* in the briefs below as to the identity of the informer, for there is nothing in the record to support that finding.

however, in the Fifth Circuit[6] and in most of the others.[7]

This conflict of authority warrants resolution by this Court, for it is inconsonant with uniform tax administration that residents of the Fifth Circuit, but not of the Seventh, should be amenable to warningless interrogations in investigations which are criminal in all but designation.[8] The *Dickerson* court, in extending the policy of *Miranda* to these non-custodial tax inquisitions, took cognizance of the coercive influences that attend on encounter between a citizen and a federal tax fraud investigator. Other courts, while just as cognizant of the coercive element, have thus far been unwilling to take the lead to extend to that area this

---

[6] *Agoranos* v. *United States*, 409 F.2d 833 (5th Cir. 1969), *cert. denied*, 396 U.S. 824 (1969).

[7] *Spinney* v. *United States*, 385 F.2d 908 (1st Cir. 1967), *cert. denied*, 390 U.S. 921 (1968); *United States* v. *Mackiewicz*, 401 F.2d 219 (2d Cir. 1968), *cert. denied*, 393 U.S. 923 (1968); *United States* v. *Mancuso*, 378 F.2d 612 (4th Cir. 1967), modified, 387 F.2d 376 (4th Cir. 1967), *cert. denied* 390 U.S. 955 (1968); *United States* v. *Maius*, 378 F.2d 716 (6th Cir. 1967), *cert. denied*, 389 U.S. 905 (1967); *Cohen* v. *United States*, 405 F.2d 34 (8th Cir. 1968), *cert. denied*, 394 U.S. 943 (1969); *Feichtmeir* v. *United States*, 389 F.2d 498 (9th Cir. 1968); *Hensley* v. *United States*, 406 F.2d 481 (10th Cir. 1968). In many of these cases, however, some form of warning or the presence of counsel was involved.

[8] The disparity in treatment is not sufficiently mitigated by the self-imposed policy of the I.R.S. to warn the citizen only after "preliminary inquiries" have failed to dispel the suspicions of criminality. IRS News Release, No. 897 (Oct. 3, 1967). The Release reads in pertinent part:

> If the potential criminal aspects of the matter are not resolved by preliminary inquiries and further investigation becomes necessary, the Special Agent is required to advise the taxpayer of his Constitutional rights to remain silent and to retain counsel.

Court's *Miranda* policy.[9] The circumstances under which and extent to which the *Miranda* policy should apply to non-custodial inquisitions designed to build criminal prosecutions comprise, we submit, a compelling matter for this Court's certiorari jurisdiction.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be granted.

Respectfully submitted,

EDWARD BENNETT WILLIAMS
HAROLD UNGAR
FRANK X. GROSSI, JR.
Counsel for Petitioner

Dated: May 1970

---

[9] *See, e.g., United States* v. *Maius*, 378 F.2d 716, 719 (6th Cir.), *cert. denied*, 389 U.S. 905 (1967):

> A citizen summoned before such federal agents has the option to refuse to answer their questions; but there are few who have the toughness of fibre and the technical knowledge of their rights, who would decline to answer questions put to them in these circumstances. Until we are told by superior authority that a citizen's constitutional rights are imperiled by such procedure, we are constrained to hold that the evidence thereby obtained is admissible in the ensuing criminal trial.

APPENDIX

APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 27489

UNITED STATES OF AMERICA, *Plaintiff-Appellee*,

v.

HARRY DAVIS, d/b/a DAVIS MFG. CO., *Defendant-Appellant*.

Appeal from the United States District Court for the Northern District of Texas

(March 10, 1970)

Before TUTTLE, WISDOM and GOLDBERG, *Circuit Judges*.

PER CURIAM: This appeal from a conviction of the appellant on six counts for violation of the criminal provisions of the Internal Revenue laws (§ 7201 and 7206(1)) raises five points aside from the contention that there was not sufficient evidence to support submitting the case to the jury, in light of the appellant's contentions respecting his purpose in not showing the substantial amount of unreported income on his books for the three years in question.

First, we state that there was ample evidence to support the jury's verdict. The point raised by appellant is that after the trial court ordered all documents to be shown that were in possession of the government to counsel for the appellant, a certain number of documents were placed in a sealed envelope for later inspection, and that at some time unknown as to either party, but before the trial, the sealed envelope had been unsealed and appellant was unable to ascertain whether any of the documents in the sealed envelope were present or missing. As to this point, we

conclude that appellant's description of this occurrence as "a wholly unscrupulous pretrial incident" with no proof to support his contention, is an overstatement of the facts even as contended for by the appellant. Moreover, no specific relief was requested by appellant of the trial court by calling this specific incident to the court's attention at the time of trial. Trial court, therefore, committed no error that is before us for review.

We conclude that the trial court did not err in denying appellant's motion to produce certain grand jury testimony of three persons who testified before the grand jury, but who were not called to testify before the jury on the trial itself, or in denying appellant's motion to produce a statement by an unnamed informer who testified before the grand jury, but who did not testify at the trial.

As to the contention that the trial court erred in denying appellant's motion to suppress evidence on the ground that the evidence had been obtained by "use of a revenue agent in lieu of a special agent to uncover incriminating evidence," without giving a Miranda warning and was a violation of taxpayer's Fourth, Fifth and Sixth Amendment rights is unsupported by the record. The trial court made full findings with respect to the normalcy of the original investigation by the revenue agent to the effect that when he discovered some evidence of possible criminal action, he notified the appellant that he had better get a lawyer and that he (the agent) was turning the matter over to a "special agent." This fact distinguishes the case from the others in this and other circuits in which the courts have begun applying, to some extent, some of the protections now afforded accused persons in other types of criminal actions.

Finally, we have carefully considered the record with respect to the introduction of certain documents, some of which were for a period of time following the years of prosecution. We agree with the position of the govern-

ment to the effect that counsel for appellant did not make plain to the trial court which of the several specific documents were objected to and obtain a ruling with respect to each one, as to their relevancy on the issues involved in the prosecution years.

The judgment is AFFIRMED.

Judgment

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

March 10, 1970

Issued as Mandate:

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 27489

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*

v.

HARRY DAVIS, d/b/a DAVIS MFG. CO., *Defendant-Appellant.*

Appeal from the United States District Court for the Northern District of Texas

ON PETITION FOR REHEARING

(April 29, 1970)

Before TUTTLE, WISDOM and GOLDBERG, *Circuit Judges.*

PER CURIAM: In our original opinion we stated, with respect to the production of Grand Jury testimony and a statement by an informer as follows:

> "We conclude that the trial court did not err in denying appellant's motion to produce certain grand jury testimony of three persons who testified before the Grand Jury, but who were not called to testify before the jury on the trial itself; or in denying appellant's motion to produce a statement by an unnamed informer who testified before the grand jury, but who did not testify at the trial."

This statement was intended to indicate that these persons were "not called *by the government*" to testify before the jury on the trial itself, because it is only with respect to witnesses actually called to testify by the prosecution that the rule of the Jencks Act applies. We did not mean to state that the three persons who testified before the grand jury were not put on the witness stand on behalf of the defendant.

The record discloses that the witnesses before the grand jury were an Internal Revenue Special Agent and three employees of the defendant. The United States did not call any of them as witnesses on the trial itself. Upon motion by the appellant the court ruled:

> "The grand jury testimony, or any statement of any witness used, will be furnished to counsel for defendant on the day before any witness in the case is placed on the witness stand, . . .
>
> Is this agreeable to counsel for both sides?
>
> "MR. MAHON: The government is agreeable to this, Your Honor.
>
> "MR. SIGEL: It is agreeable with the defendant, Your Honor."

When at the conclusion of the government's case, it appeared that none of the three employees of the defendant who had appeared before the Grand Jury had been called by the United States, the defendant made the following motion:

> "MR. SIGEL: There is one thing I would like to have on the record, and that is that the Government has now indicated that he will close his case with one last technical witness. As a result, it appears that none of the witnesses who appeared in the grand jury were called by the Government and that means that there is the likelihood that the Government has changed its theory, that there is evidence possibly in the grand jury minutes that might possibly be to our advantage, and we again request the Court to allow us to see it. After all, not one of these witnesses has been called.

The Court overruled this motion.

Thereafter, the defendant called all three witnesses who were his employees and the government undertook to cross-

examine one of them, Smith, by confronting him with his Grand Jury testimony. Appellant complains that the refusal of the trial court to make the entire grand jury minutes available prejudiced his cause in meeting this effort by the government to show any inconsistencies between the witness' testimony and his prior testimony before the grand jury.

We find no error in the only ruling made by the trial court with reference to this matter.

The appellant also complains of the failure of the trial court to require a disclosure by the government of the identity of the informer, who appellant says in his brief here, was "presumably" an employee of the defendant.[1]

The government did not use as a witness any employee of the appellant who had testified before the grand jury. The question of the correctness of the trial court's refusal to require the disclosure of the identity of the informer is therefore tested by the rule stated in *Roviaro* v. *United States*, 353 U.S. 53, which holds that protecting the identity of informers is an important policy which will yield only to a particularized showing of need in an individual case. We think that the trial court did not err in its decision to protect the identity of the informer in this case.

We strike the paragraph of the opinion first quoted above and modify the opinion by substituting what is said here.

In all other respects this Motion for Rehearing is OVERRULED.

---

[1] Appellant's brief here states: "Statements contained in Agent Palmer's referral report make it quite obvious that information in the informant's report which Palmer referred to and relied upon came from an employee of defendant who presumably was the informant."